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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MARK A.,
as parent and next friend of
ALLEAH A., a minor child,

Petitioner,

v.

GRANT WOOD AREA EDUCATION AGENCY,
an Iowa School Corporation;
IOWA CITY COMMUNITY SCHOOL DISTRICT,
an Iowa School Corporation;
and
ROBERT D. BENTON,
in his offical capacity as Director,
Iowa Department of Education,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether an education agency may satisfy the least restrictive environment mandate of the Education for All Handicapped Children Act, 20 U.S.C. § 1412(5)(B) (1982), by placing a preschool handicapped child in a nonintegrated special education classroom located in a regular public school building without providing opportunities for meaningful interaction with the child's nonhandicapped peers.

PARTIES BELOW

The only party to the proceedings below not listed in the caption is Ruth Adix, an appellant in the Court of Appeals for the Eighth Circuit.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioner, Mark A., respectfully requests that a writ of certiorari issue to review the judgment and opinion entered by the Court of Appeals for the Eighth Circuit in this cause on July 3, 1986.

OPINIONS BELOW

The Decision of the Iowa Department of Education hearing officer is reproduced in the Appendices (App. E, *infra*, 19a-70a). The Order of the U.S. District Court for the Southern District of Iowa is not reported but is reproduced in the Appendices (App. D, *infra*, 14a-18a). The Opinion of the Court of Appeals for the Eighth Circuit is reported at 795 F.2d 52. That Opinion is also reproduced in the Appendices (App. A, *infra*, 1a-10a).

JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on July 3, 1986 (App. A, *infra*, 1a-10a). A timely Petition for Rehearing with Suggestion for Rehearing En Banc was denied on August 28, 1986 (App. B, *infra*, 11a). This Petition for a Writ of Certiorari is timely filed within 90 days of that date. The jurisdiction of this

Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES AND REGULATIONS INVOLVED*

20 U.S.C. § 1412(5)(B) (1982)
34 C.F.R. § 300.550 (1986)
34 C.F.R. § 300.551 (1986)
34 C.F.R. § 300.552 (1986)
34 C.F.R. § 300.553 (1986)

*These statutory provisions and regulations are set forth in the Appendices (App. F, *infra*, 71a-76a).

STATEMENT OF THE CASE

Alleah A. is a six-year-old child who was born with microcephaly, athetoid cerebral palsy, and mental retardation. Alleah's developmental age is approximately one-half of her chronological age. Because of her handicapping conditions, Alleah qualifies for special education and related services under the Education for All Handicapped Children Act, 20 U.S.C. §§ 1400-1461 (1982 & Supp. III 1985).

In October 1981, Alleah began attending Handicare, Inc., a private, nonprofit daycare center in Iowa City, Iowa, which serves both handicapped and nonhandicapped children from infancy through age six. The Handicare program is developmental in nature and is specifically designed to foster interaction between nonhandicapped and handicapped children. Alleah made steady progress in Handicare's integrated environment.

Soon after Alleah began attending Handicare, she was referred to the Grant Wood Area Education Agency, an educational agency which provides special education and related services to handicapped children.[1] After

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1. Area education agencies are regional entities which provide various special education and related services to school districts in the State of Iowa. Iowa Code § 273.5 (1985). In some areas, such as that involved in the instant case,

completing numerous evaluations, Grant Wood Area Education Agency (hereinafter AEA) held a staffing in February 1982, where it was determined that the appropriate placement for Alleah was a home-bound program. Alleah began the home-bound program in February, 1982, as well as continuing to attend the Handicare preschool. On June 1, 1983, another staffing was held to determine Alleah's educational placement for the 1983-84 school year. At that staffing, educational personnel recommended that Alleah be placed in the self-contained preschool developmental class (hereinafter PDC) at Horace Mann Elementary School in Iowa City, Iowa.

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area education agencies make placement and programming decisions on behalf of school districts within their service area. However, the school districts provide the funding for the provision of special education services. Iowa Code § 273.9 (1985).

During the school year, Alleah's contact with nonhandicapped children in that placement would have been limited to one all-school picnic and five fifteen-minute visits by nonhandicapped students to her classroom during "Handicapped Awareness Week".

Because of the segregated nature of the Horace Mann PDC, on September 30, 1983, Alleah's parents initiated an administrative action to challenge the recommended placement. Alleah's parents contended that Alleah's then-present program at Handicare was the appropriate educational placement because of Handicare's strong commitment to serving both handicapped and nonhandicapped children in an educational environment which provides opportunities for meaningful integration. An administrative hearing was held on May 15, 1984, before an administrative

hearing officer appointed by the Iowa Department of Education. The hearing officer affirmed the AEA's placement recommendation in a decision issued August 1, 1985 (App. E, *infra*, 70a).

On September 4, 1984, an action was commenced in the Southern District of Iowa in accordance with 20 U.S.C. § 1415(e)(2) (1982). The case was submitted to the district court on a stipulated record. Alleah's parents contended that the AEA's proposal to place Alleah in the PDC violated the least restrictive environment mandate[2/] of the Education for All Handicapped Children Act, 20 U.S.C. §§ 1400-1461

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2. The Act itself refers to integration of handicapped children with nonhandicapped children as "mainstreaming". *See* 20 U.S.C. § 1412(5)(B) (1982). The regulations implementing the Act use the phrase "least restrictive environment" when referring to integration. 34 C.F.R. §§ 300.550-300.556 (1986). Thus, in this Petition the terms are used interchangeably.

(1982 & Supp. III 1985) (hereinafter Act), because the PDC, although physically located in a regular public school building, was not integrated. Thus, opportunities for meaningful interaction with nonhandicapped children were severely limited, resulting in functional segregation. On October 25, 1985, the district court entered a judgment upholding the decision of the hearing officer (App. C, *infra*, 13a). The district court ruled that neither federal nor state laws require school districts to contract with private institutions in order to meet the least restrictive environment mandate of the Act when the state does not require public preschool education for nonhandicapped children (App. D, *infra*, 17a).

The Eighth Circuit Court of Appeals affirmed the district court in an opinion

filed July 3, 1986 (App. A, *infra*, 10a). In holding that the school district had complied with the Act, the panel, in the opinion authored by Senior Judge Luther M. Swygert, sitting by designation, stated: "We reject the view that the mainstreaming provisions of the Act are satisfied only if a handicapped child is educated *in the same classroom* with nonhandicapped children.... Alleah, at the very least will be educated *in the same school* with nonhandicapped children."[3/] *Mark and Ruth A. v. Grant*

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3. Alleah's parents never urged that in every instance the mainstreaming mandate compels the placement of handicapped children in the same classroom as nonhandicapped students for academic subjects. The parents' position has always been that the integration requirement may be satisfied by placing the preschool handicapped child in activity classes such as music, physical education and art, with kindergarten or Head Start children, or by placement in a private daycare program. *See* Cullar, Rulings/Policy Letters, Supp. 135, 1/4/85, 211 EHLR 347 (App. G, *infra*, 81a). The issue is not so much the physical location of the program, but

Wood Area Education Agency, 795 F.2d 52, 54 (8th Cir. 1986) (App. A, *infra*, 8a) (hereinafter *Alleah A.*) (emphasis in the original).

On July 16, 1986, a timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed. On August 28, 1986, the Petition was denied with two judges voting in favor of rehearing (App. B, *infra*, 11a).

REASONS FOR GRANTING A WRIT OF CERTIORARI

I. A WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS OVER THE JUDICIAL INTERPRETATION OF THE LEAST RESTRICTIVE ENVIRONMENT MANDATE OF THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT, 20 U.S.C. § 1412(5)(B) (1982).

In *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983) (hereinafter *Roncker*), the Sixth Circuit held that the least restrictive environment mandate must be

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rather the opportunities provided for meaningful integration.

analyzed from the perspective of the availability of meaningful, structured interaction between handicapped and nonhandicapped children. Neill Roncker was a nine-year-old boy classified as trainably mentally handicapped. He was staffed from an integrated educational placement into a public school exclusively for mentally retarded children. The school acknowledged that Neill would have no contact with nonhandicapped students at the public school, but contended that integration was unimportant for Neill because he would benefit only marginally from interaction with nonhandicapped children. It is important to note that Neill had made no significant progress during his eighteen-month placement in the integrated setting. Nevertheless, the Sixth Circuit did not consider this lack of progress dispositive in determining

whether the child had been mainstreamed to the maximum extent appropriate. The court held that "[t]he proper inquiry is whether a proposed placement is appropriate under the Act. In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming." *Id.* at 1063. Clearly, the least restrictive environment mandate was analyzed in terms of interaction between Neill and his nonhandicapped peers.4/

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4. A leading educational law scholar has developed a two-step analytical approach for determining the least restrictive environment. First, a range of available placements which satisfy the handicapped child's educational needs must be identified. Second, from among the available placements, the one which affords the handicapped child the most opportunity to interact with nonhandicapped children must be chosen as the least restrictive environment. Turnbull, *A Policy Analysis of "Least Restrictive" Education of Handicapped Children*, 14 Rutgers L.J. 489, 515 (1983).

In holding that a school district may meet the least restrictive environment mandate of the Act by placing a child in a self-contained special education classroom physically located in a regular public school building, without regard to the severely limited opportunities for interaction with nonhandicapped students, the panel's opinion in the instant case is in direct conflict with the Sixth Circuit's holding in *Roncker*. The PDC, in which Alleah's contact with nonhandicapped children would have been limited to one annual all-school picnic and five fifteen-minute visits during "Handicapped Awareness Week", is the functional equivalent of the entirely segregated facility which the Sixth Circuit held would not provide Neill Roncker the degree of mainstreaming that was required under the Act.

The functional segregation of the PDC cannot possibly be said to satisfy the Act's requirement that "'to the maximum extent' possible, without sacrificing the child's right to an appropriate education, the handicapped must be educated with the nonhandicapped." *Springdale School District #50 v. Grace*, 693 F.2d 41, 43 (8th Cir. 1982) (hereinafter *Springdale II*). The panel in *Alleah A.* obviously gave no consideration to the relative opportunities for interaction in the two placements when determining the least restrictive environment. The court's analysis consisted of nothing more than distinguishing between a public and private school. That approach is not only contrary to the language of the Act and the regulations, but is clearly inconsistent with the analysis and

holding of *Roncker*.[5/] *Alleah A.* provides

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5. The decision below is also inconsistent with the Eighth Circuit's own holding in *Springdale School District #50 v. Grace*, 693 F.2d 41 (8th Cir. 1982). *Springdale II* involved the educational placement of Sherry Grace, a deaf student. At age six Sherry was enrolled in the Arkansas School for the Deaf, where she remained a student for three years. Although her progress at the School for the Deaf was marked, Sherry was removed by her parents at the end of her third year of placement and enrolled in a regular public school where she would have personalized instruction by a certified teacher of the deaf, as well as other support services. The Eighth Circuit, in its original decision issued, as amended, on October 2, 1981, held that, although the education at the School for the Deaf would have undoubtedly been superior in terms of academic content, the educational program at either facility would provide educational benefit. However, in determining which placement fulfilled the mainstreaming mandate of the Act, the court observed:

> Our holding today is further supported by the mainstreaming requirements of the Act...that "to the maximum extent" possible, without sacrificing the child's right to an appropriate education, the handicapped must be educated with the nonhandicapped.... At the [local district school] Sherry would be with nonhandicapped children for physical education, library, and possibly penmanship, science,

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> health, social studies, music and art. At the School for the Deaf, however, Sherry would have virtually no contact with nonhandicapped children.

Springdale School District #50 v. Grace, 656 F.2d 300, 305 (8th Cir. 1981) (hereinafter *Sprindale I*).

Upon remand by the Supreme Court in light of *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175 (1982), the Eighth Circuit reaffirmed the district court, once again analyzing mainstreaming in terms of interaction between handicapped and nonhandicapped students:

> This goal of mainstreaming is served by Sherry's education at the Springdale School rather than at the School of the Deaf. At Springdale, Sherry will be with nonhandicapped children for some of her classes, while at the School for the Deaf she would have no contact with such children.

Springdale II, 693 F.2d at 43.

The analytical approach taken by the panel in *Alleah A.* inevitably led to a result which conflicts with *Springdale I and II*. Essentially, the *Springdale* courts interpreted the mainstreaming requirement of the Act through a two-part analysis. First, they determined whether both educational placements would provide Sherry with educational benefit. Since both placements did so, the second query was whether one placement provided greater opportunity for interaction with nonhandicapped students than the other. The educational setting which provided

greater opportunity for such interaction was thus found to be the placement meeting the requirements of the Act. This approach is consistent with that utilized by other courts. *See Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983) and *Bonadonna v. Cooperman*, 619 F. Supp. 401 (D.N.J. 1985). *See also* Turnbull, *A Policy Analysis of "Least Restrictive" Education of Handicapped Children*, 14 Rutgers L.J. 489, 515 (1983). Because Springdale School provided the greatest interaction with nonhandicapped children, it was the appropriate placement, despite the fact that the School for the Deaf may have provided the best educational opportunities for Sherry Grace. It was this fact that led the Court in *Springdale II* to comment that "the Supreme Court has made it clear that the Act does not require states to make available the *best* possible option." *Springdale II*, 693 F.2d at 43 (emphasis in the original).

The panel in *Alleah A.* misconstrued *Springdale II* when it stated "[a]lthough Handicare may indeed offer the *best* educational opportunities for Alleah, 'the Act does not require states to make available the *best* possible option.'" *Alleah A.*, 795 F.2d at 54 (App. A, *infra*, 9a). Clearly, the Act cannot require the states to make available the best possible educational opportunity if, in so requiring, it violates the mainstreaming provision of the Act. In this case, it is irrelevant whether Handicare offered Alleah the "best educational opportunities" because, although both placements would have

the Court an opportunity to resolve the conflict among the circuits over the judicial interpretations of the mainstreaming requirement and to give the lower federal courts much needed guidance in dealing with the critical issues surrounding the setting in which handicapped children will be educated.

The least restrictive environment concept in the education of handicapped children represents a crucial step toward normalization. It presents an opportunity for handicapped children to learn to function successfully in a nonhandicapped world by developing appropriate behaviors, attitudes and values. It provides a chance for each individual to gain the maximum independence and self-sufficiency he or

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provided Alleah educational benefit, only Handicare offered her the opportunity to meaningfully interact with nonhandicapped children.

she is capable of attaining. The least restrictive environment requirement, therefore, is an integral part of every handicapped child's free appropriate public education. The mandate is much more than a social goal; it is a statutory directive which must not be interpreted out of existence.

II. A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE MEANING OF THE LEAST RESTRICTIVE ENVIRONMENT MANDATE OF THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT, 20 U.S.C. § 1412(5)(B)(1982), HAS NOT BEEN SETTLED BY THIS COURT AND AN INTERPRETATION OF THAT MANDATE IS OF PROFOUND NATIONAL IMPORTANCE.

In *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 175 1982) (hereinafter *Rowley*), the Court examined the free appropriate public education requirement of the Act. The "basic floor of opportunity" required by the Act was found to consist of access to specialized instruction and related

services individually designed to provide educational benefit to the handicapped child. *Id.* at 201. Although the *Rowley* "educational benefit" test provides guidance in determining whether a handicapped child is receiving a free appropriate public education, the right to receive a free appropriate public education is not the only substantive right conferred by the Act. Handicapped children are entitled to receive that free appropriate public education in the least restrictive environment.6/ Thus,

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6. The mainstreaming requirement of the Act provides:

> The State...[must establish]...procedures to assure that, to the maximum extent appropriate, handicapped children...are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids

the question in this case is not whether the content of Alleah's educational program as proposed by the AEA is sufficient to meet the Act's free appropriate public education mandate. Rather, the question is whether that proposed program would provide Alleah with an appropriate education in the least restrictive environment.

The question presented in this case of first impression involves the judicial interpretation of the least restrictive environment mandate of the Act as applied to preschool handicapped children. The interpretation of that mandate by the Eighth Circuit in the instant case makes painfully clear the need for a definitive Supreme Court ruling on the meaning of

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and services cannot be achieved satisfactorily....

20 U.S.C. § 1412(5)(B)(1982)

the least restrictive environment requirement of the Act.

The Eighth Circuit's decision in *Alleah A.* cannot be remedied by reference to this Court's statement that "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the states." *Rowley*, 458 U.S. at 208. The decision by the AEA to place Alleah in a PDC serving exclusively handicapped children and providing only minimal contact with nonhandicapped students was not merely a question of methodology. The Eighth Circuit's affirmance of that placement will now permit school districts to circumvent the statutory directive of mainstreaming. Couched in language that on its face appears to be giving the required deference to a state's primacy in the field of education, the Eighth Circuit's analysis

of mainstreaming purely in terms of physical and temporal placement of a handicapped classroom in a regular public school building renders the requirement meaningless.

The least restrictive environment mandate of the Act was a response to the inequality inherent in separate self-contained special education classrooms and schools. Turnbull, *The Least Restrictive Education for Handicapped Children: Who Really Wants It?*, 16 Family L.Q. 161 (1982). Inclusion of the least restrictive environment mandate in the Act was "an attempt to protect exceptional children from the stereotype that they are different and deficient. It addressed stigmatizing effects of special educational placement -- the effects that such placement has on the child's self-image and on the school's and his peers' image of him." *Id.* at

168. While mainstreaming continues to generate considerable controversy among educators and parents of handicapped children,[7] it is clear that Congress has made the philosophical choice in favor of mainstreaming and states are bound to act in accordance with that decision. *Campbell v. Talladege City Board of Education*, 518 F. Supp. 47, 55 (N.D. Ala. 1981). *See also Bonadonna v. Cooperman*, 619 F. Supp. 401 (D.N.J. 1985). The language of 20 U.S.C. § 1412(5)(B) (1982) "indicates a very strong Congressional preference [for mainstreaming]." *Roncker*, 700 F.2d at 1063. And, as noted by the Eighth Circuit in *Springdale II*, 693 F.2d at 43, the requirement that states educate handicapped children "with children who are not handicapped" to the

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7. *See, e.g., Lora v. Board of Education of City of New York*, 456 F. Supp. 1211, 1264, *vacated*, 623 F.2d 248 (2nd Cir. 1980).

maximum extent appropriate was one of the primary directives of *Rowley*.

Case law supports the proposition that the least restrictive environment mandate requires more than mere physical placement of a self-contained special education classroom in a regular public school building. Additionally, there is no definition or discussion of mainstreaming in educational literature which could possibly be reconciled with such an interpretation of the Act's least restrictive environment mandate.[8/]

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8. *See, e.g.*, Guralnick, *The Value of Integrating Handicapped and Nonhandicapped Preschool Children*, 46 Am. J. Orthopsychiatry 236, 237 (1976) ("The critical component [of mainstreaming] is not the simple presence of handicapped children in the class, but the way in which interactions among these children are systematically guided or encouraged."); Apolloni, *et al.*, *Establishing a Normal Peer as a Behavioral Model for Developmentally Delayed Toddlers*, 44 Perceptual and Motor Skills 231, 240 (1977) ("structured training to induce delayed children to imitate a more advanced peer is feasible

More than mere physical placement of a special education classroom in a regular public school is required even when a state does not provide public preschool education to nonhandicapped children. The Act and the implementing regulations impose the mainstreaming requirement uniformly on all programs. Additionally, the Federal Office of Special Education Programs, Department of Education, in

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and this may, through further research, prove an efficacious approach for programming generalized peer-imitation in integrated preschool settings."). *See also* A. Turnbull, *Policy and Implementation Analysis*, 4 Educational Evaluation and Policy Analysis 281, 283 (1982) ("To determine the least restrictive placement, two decisions must be made. The first decision involves choosing the range of educational environments from the full continuum of services that can adequately meet the child's needs. From consideration of each of these environments, the second decision involves the identification of the particular environment that can most substantially contribute to the child's freedom to interact meaningfully and successfully with persons who are not handicapped.").

Cullar, Rulings/Policy Letters, Supp. 135, 1/4/85, 211 EHLR 347 (hereinafter Cullar Policy Letter) (App. G, *infra*, 77a), expressly addressed Iowa's educational system. In very explicit language, the Cullar Policy Letter indicated that states which do not have preschool nonhandicapped programs are not relieved from their "statutory responsibility to implement the LRE [least restrictive environment] provisions under 34 C.F.R. §§ 300.500-300.556 with regard to preschool handicapped children." (App. G, *infra*, 81a).

To meet the least restrictive environment requirement, the Act contemplates that states may place handicapped children in private schools or facilities at state expense. 20 U.S.C. § 1413(a)(4)(B) (1982). The legislative history of the Act is

explicit in its support of the utilization of private nonprofit preschools in meeting federal requirements. The pertinent Senate Report states:

> [W]hile the Committee has provided that the State educational agency is to be the final responsible authority for assuring that all handicapped children have available to them free and appropriate public education, it does not intend that the State and local educational agencies are responsible under the Act for making available educational services to handicapped children, the *Committee believes that these funds should be deployed wisely, and public and private non-profit agencies currently providing preschool services should be utilized to meet the full services mandate.* The Committee points out, however, that services provided in this fashion are required to meet all the requirements of the Committee bill including provisions relating to the least restrictive environment.

S. Rep. No. 168, 94th Cong. 1st Sess. 22, *reprinted in* 1975 U.S. Code Cong. & Ad. News 145, 146 (emphasis added). This statement clearly authorizes educational agencies to enter into contractual

arrangements with private agencies or facilities in order to meet the least restrictive environment mandate of the Act.

Petitioner readily concedes that school districts are not obligated "to enter into *extensive* contractual arrangements with private facilities for the sole purpose of implementing the LRE provisions." Cullar Policy Letter, (App. G, *infra*, 81a) (emphasis added). School districts may meet the mainstreaming requirement by linking preschool handicapped programs to preschool programs for nonhandicapped children operated by other public agencies, such as Head Start, or by locating preschool handicapped programs in regular elementary school buildings. *Id.* But when it was contemplated that the mainstreaming requirement could be met by locating preschool handicapped programs

in regular elementary school buildings, more than mere physical placement was intended. The PDC into which it was recommended that Alleah be placed provides such minimal contact between handicapped and nonhandicapped children that it must be considered the equivalent of an entirely segregated setting, precisely the evil that the mainstreaming provision of the Act was crafted to remedy. Therefore, if the only avenue available for satisfying the requirement is by placement in a private, nonprofit school, then that is what must be done.

Petitioner also concedes that the Act does not "compel the state to establish entire new levels of public education services to satisfy the Act's mainstreaming requirements." *Alleah A.*, 795 F.2d at 54 (App. A, *infra*, 9a-10a). In the instant case, a self-contained PDC is not the least restrictive environment

and placement in a private, nonprofit school is the only way the AEA can meaningfully comply with the Act's requirement. The issue is not what is most appropriate for the AEA in terms of economy, but what degree of mainstreaming is most appropriate for the handicapped child.

The Act requires that an individualized educational program be developed to meet the unique needs of each handicapped child and that the program be implemented in an environment which permits the child, to the maximum extent appropriate, to be educated with nonhandicapped children.[9] 20 U.S.C.

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9. "[W]hen making a placement decision, priority should be given to providing an appropriate education, and second to consideration of provisions for appropriate education in an environment that minimizes infringement on the liberty to associate with nonhandicapped peers." Turnbull, *A Policy Analysis of "Least Restrictive" Education of Handicapped Children*, 14 Rutgers L.J.

§ 1412(5)(B) (1982). Thus, the concept of mainstreaming should be analyzed and implemented in terms of concrete opportunities for handicapped children to interact meaningfully with nonhandicapped peers and not, as the Eighth Circuit held here, in terms of a purely physical and temporal placement in a public school building. The latter interpretation renders the mainstreaming requirement virtually meaningless.

A writ of certiorari should be granted because the interpretation of the Act's least restrictive environment mandate will significantly impact the future integration of handicapped children. The Eighth Circuit's holding in *Alleah A.* creates binding case authority for the nearly 27,000 preschool handicapped children receiving services in the seven

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489, 515 (1983).

states comprising the Eighth Circuit, and is persuasive case authority for the 216,000 preschool handicapped children in the remainder of the country.10/ The public importance of that impact for society cannot be overstated. "We are concerned that children with handicapping conditions be educated in the most normal possible and least restrictive setting, for how else will they adapt to the world beyond the educational environment, and how else will the nonhandicapped adapt to them?" 120 Cong. Rec. 15,272 (1974) (remarks of Sen. Stafford).

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10. *See Seventh Annual Report to Congress on the Implementation of the Education of the Handicapped Act*, Division of Educational Series, Special Education Programs, U.S. Department of Education at 201.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted to review the Judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDICES

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MARK A.,
as parent and next friend of
ALLEAH A., a minor child,

Petitioner,

v.

GRANT WOOD AREA EDUCATION AGENCY,
an Iowa School Corporation;
IOWA CITY COMMUNITY SCHOOL DISTRICT,
an Iowa School Corporation;
and
ROBERT D. BENTON,
in his offical capacity as Director,
Iowa Department of Education,

Respondents.

APPENDICES TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2357 SI

MARK and RUTH A., as parents
and next friends of ALLEAH A.,
a minor child,

Appellants,

v.

GRANT WOOD AREA EDUCATION
AGENCY, an Iowa School Corporation;
IOWA CITY COMMUNITY SCHOOL DISTRICT,
an Iowa School Corporation;
and
ROBERT D. BENTON, in his
official capacity as Iowa State
Superintendent of Public Instruction,

Appellees.

Submitted: April 14, 1986
Filed: July 3, 1986

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
IOWA

Before GIBSON and FAGG, Circuit Judges, and SWYGERT, Senior Circuit Judge.*

SWYGERT, Senior Circuit Judge.

Alleah A. was born on September 13, 1980. She suffers from alternating estropia (crossed eyes), nystogmes (oscillation of the eyeballs), microcephaly (abnormal smallness of the head), and athetoid cerebral palsy. Her developmental age is one-half of her chronological age.

In October 1981 Alleah began attending Handicare, Inc., a private nonprofit daycare center for children from infancy through age six. Handicare's educational program is designed to foster interaction between handicapped and nonhandicapped children. In the same month Alleah was

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*The HONORABLE LUTHER M. SWYGERT, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

referred to the Grant Wood Area EducationAgency's Early Childhood Program ("Grant Wood"). After administering numerous tests, the Grant Wood Program, in February 1982, agreed to place Alleah at Handicare. Such placement recommendations are reviewed annually and Alleah's placement in Handicare was reevaluated in June 1983. At that time Grant Wood recommended placement in a preschool development class at Horace Mann Elementary School in Iowa City, Iowa. Horace Mann is a regular elementary school in the Iowa City Community School District. The Grant Wood staff concluded that:

> Specific program needs were identified in all developmental areas. Alleah will require occupational and physical therapy, assistance with the developmental, self-skills, particularly eating and dressing, effective methods of communication, development of cognitive skills, all within an envirnoment [sic] that is structured to facilitate the teaching of these skills. It was agreed that

> it will be particularly important to make use of all sensory modalities when working with Alleah, particularly the use of her tactile skills. Adaptation of some instructional materials will be required and appropriate positioning will be important in facilitating learning.

Alleah's parents objected to the new placement. They believe that Alleah's present placement at Handicare is the more appropriate educational placement because of its strong commitment to serving both handicapped and nonhandicapped children in an integrated setting. An administrative hearing was held on May 15, 1984 before a hearing officer appointed by the Iowa Department of Public Instruction. On August 1, 1984 the hearing officer affirmed the Grant Wood placement decision. On September 4, 1984 Alleah's parents filed suit in the United States Distrtict [sic] Court for the Southern District of Iowa. The case was submitted on a stipulated record. On

October 25, 1985 the district court upheld the decision of the hearing officer. The sole issue raised by this appeal is whether the decision to place Alleah in a public educational program serving only handicapped children, rather than in a private program serving both handicapped and nonhandicapped children, violates the Education for All Handicapped Children Act ("the Act"). 20 U.S.C. §§ 1401 *et seq.**

The Act provides federal money to assist state and local agencies in educating handicapped children, but conditions funding upon a state's compliance with certain guidelines and procedures. To qualify for federal financial assistance, a state must demonstrate that it has in effect a

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*We decline to address Grant Wood's jurisdictional arguments.

policy that assures all handicapped children the right to a "free appropriate public education." 20 U.S.C. § 1412(1). This education must be tailored to the unique needs of the handicapped child by means of an individualized educational program. Section 1401(18). This program must be reviewed annually. Section 1414(a)(5). For the purposes of this appeal, the most important provision of the Act requires that states, "to the maximum extent appropriate," must educate handicapped children with children who are not handicapped. Section 1412(5). This requirement is known as "mainstreaming." [sic] In the federal regulations implementing the Act the mainstreaming requirement is referred to as the "least restrictive environment." [sic] 34 C.F.R. §§ 300.550-300.556. It is this aspect of the Act that Alleah's parents allege has been violated by

Alleah's placement in a public educational program serving only handicapped children.

In *Springdale School District #50 v. Grace*, 693 F.2d 41, 43 (8th Cir. 1982), this court emphasized the importance of the Act's mainstreaming provisions. In *Springdale* a state education department had recommended the placement of a prelingually deaf child in a local public school and had ordered the provision of supplemental services. The local public school district had objected to being forced to bear the costs of those supplemental services. The school district argued that the Act required only that the child be placed in the State School for the Deaf. This court rejected this challenge to the state's placement recommendation. "The cost to the school or the judgment of local authorities do not justify the

intervention of this Court to place [the child] elsewhere when the mainstreaming provisions of the Act and the judgment of the State's administrative decisionmakers support a finding that the Springdale School can provide a 'free appropriate *public* education' consistent with the Act." *Id.* (emphasis added).

In *Springdale* we recognized that the Act creates a clear preference for *public* educational placement when that placement is not inconsistent with the mainstreaming provisions of the Act. We reject the view that the mainstreaming provisions of the Act are satisfied only if a handicapped child is educated *in the same classroom* with nonhandicapped children. *Id.* Alleah, at the very least, will be educated *in the same school* with nonhandicapped children. The Supreme Court in *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S.

176, 202 (1982), emphasized that mainstreaming must be effectuated only to the "maximum extent appropriate." [sic] Although Handicare may indeed offer the *best* educational opportunities for Alleah, "the Act does not require states to make available the *best* possible option." [sic] *Springdale*, 693 F.2d at 43. "[O]nce a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States." *Rowley*, 458 U.S. at 208.

It should be noted that Iowa does not currently provide integrated public preschool education programs. While the Act mandates that handicapped children receive, to the extent possible, an appropriate public integrated education, it does not compel the state to establish entire new levels of public education

services to satisfy the Act's mainstreaming requirements.

Of course, Alleah's parents may continue to send her to Handicare at their expense, but nothing in the Education for All Handicapped Children Act mandates that the state assume the costs of that education. We are unwilling to disturb the judgment of Iowa's educational authorities that Alleah may receive a free and appropriate public education at a public elementary school.

The decision of the district court is

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2357-SI

MARK and RUTH A., etc., et al.,

Appellants,

vs.

GRANT WOOD AREA EDUCATION AGENCY, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Judges Gerald W. Heaney and Theodore McMillian would have granted the petitions.

Petition for rehearing by the panel is also denied.

August 28, 1986

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

Case Number 84-157-D-1

MARK and RUTH A., as parents and next friends of ALLEAH A., a minor child,

Plaintiffs,

v.

GRANT WOOD AREA EDUCATION AGENCY, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that the Decision of the Hearing Officer is affirmed. Parties are to bear their own costs.

Date	Clerk JAMES R. ROSENBAUM
October 25, 1985	/s/ DIANE F. DUNCAN
	(By) Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

CIVIL NO. 84-157-D-1

MARK and RUTH A., as parents and next friends of ALLEAH A., a minor child,

Plaintiffs,

vs.

GRANT WOOD AREA EDUCATION AGENCY, et al.,

Defendants.

ORDER

Filed: October 23, 1985

This is a matter to be tried on the record as fully stipulated by the parties. Alleah A. is a four year old suffering from athetoid cerebral palsy and other handicapping disorders. Per a staffing decision on June 1, 1983 a

determination was made to place Alleah in a self-contained preschool developmental class (PDC). Alleah's parents objected to this placement as improper and received a hearing on the proposed placement. In an August 1, 1984 decision the hearing officer affirmed the placement recommendation of June 1, 1983. Still disagreeing with the appropriateness of the placement, the parents filed this action.

The Education of Handicapped Persons Act [sic], 20 U.S.C. § 1412 requires that State's [sic] provide all handicapped children with the right to a free appropriate public education. 20 U.S.C. § 1412 (5)(B) further requires that handicapped children be educated with non-handicapped children to the "maximum extent appropriate" and are to be separated only when services are not satisfactory due to the severity of the

handicap. The Iowa Code § 281.2 follows this requirement and adds that pre-school services will be provided when such services will help prepare the child to enter school.

The United States Supreme Court has stated that there are two questions for the court in this type of action: (1) has the state complied with the procedures in the Act; and (2) is the individualized program developed for the child designed to allow the child to receive educational benefits. *Board of Education v. Rowley*, 458 U.S. 176, 206-207 (1982). It is not disputed that the procedural requirements have been met.

The dispute concerns the second inquiry insomuch as the plaintiff contends Alleah is not being educated with non-handicapped children. The State of Iowa does not require pre-school for non-handicapped children. School

districts would be required to contract with private institutions in order to provide a co-mingled (mainstreaming) educational environment for pre-school handicapped children when there is no public educational program for non-handicapped children. The Court can find no mandate in either federal law or state law directing or permitting this action.

The hearing officer determined that the staffing decision to place Alleah in a PDC was correct. There is no indication or dispute that Alleah would not be able to benefit educationally from this placement. Therefore, the requirements of the Act have been met. Once this determination has been made by the Court, the methodology is for resolution by the State. *Rowley*, 458 U.S. at 208.

This decision is in no way meant to detract from the importance of

mainstreaming. Were the facts different, i.e., involving a school age [sic] child, mainstreaming may require the State to take different action.

IT IS THEREFORE ORDERED that the hearing officer is affirmed. Parties will bear their own costs.

Signed this 23rd day of October, 1985.

/s/ W.C. Stuart

W.C. STUART, JUDGE

SOUTHERN DISTRICT OF IOWA

APPENDIX E

IOWA STATE BOARD OF PUBLIC INSTRUCTION

In re Alleah A., Mark and Ruth A.,

Appellants,

v.

AREA EDUCATION AGENCY 10,

Appellee.

DECISION

[Admin. Doc. 713]

The above entitled matter was heard on May 15, 1984, before Merle A. Wilson, hearing officer appointed by the State Superintendent of Public Instruction, Robert Benton. The hearing was held pursuant to The Code of Iowa chapter [sic] 281, 1983, and Departmental Rules, chapter [sic] 670--51, Iowa Administrative Code. The Appellants, Mr. and Mrs. A., were represented by Intern Attorney Steve Wandro, with assistance

from Attorney Carroll Lucht, director [sic], Clinical Law Programs, University of Iowa. The Appellee, Grant Wood Area Education Agency (hereinafter GWAEA) was represented by Myron Rodee, director of special education [sic] for GWAEA, with assistance from Attorney John Cruise, representing the interests of the Iowa City Community School District (hereinafter District). At the request of the Appellants, the hearing was open to the public. Witnesses were sequestered in an adjoining room.

The Appellants appealed a decision of the GWAEA regarding the educational placement of their daughter, Alleah.

I. FINDINGS OF FACT

The Hearing Officer finds that he and the State Board of Public Instruction have jurisdiction over the parties and subject matter in this hearing.

Both parties to the hearing agreed jointly and submitted twenty-eight Exhibits, including the central educational file, and Exhibit 28A, "Speech and Language Report," dated February 15, 1984. These Exhibits were entered into and made a part of the record of this hearing.

Alleah was born on September 13, 1980, and records indicate a full-term pregnancy. At the time of delivery a prolapsed umbilical cord was noted. At one and a half months, an episode of stiffening with rolling back of eyes and extension of the head was noted. Two or three additional spells were observed in the following months. At three months of age, Alleah was noted to have abnormal eye movements with alternating esotropia. In March, 1981, Alleah was evaluated by University of Iowa Pediatric Ophthalmology Service, at which time

alternating esotropia with probably block nystagmus was diagnosed. At eight and a half months, Alleah was evaluated by University of Iowa Pediatric Neurology Service for developmental delay and abnormal eye movements. Moderate developmental delay was noted. She was also noted to have microcephaly and a probably convulsive disorder with possible myoclonus. On June 8, 1981, Alleah was admitted to University of Iowa Pediatric Service for further evaluations. The impression and diagnosis at that time was: 1) Developmental delay, etiology unknown; and 2) Alternating esotropia. At age one year, Alleah was diagnosed as having developmental delay, hypotonia and bilateral esotropia. At age 20 months, she was evaluated at the Rehabilitation Institute of Chicago. At that time, the

problems of athetoid cerebral palsy and severe dysarthria were noted.

Alleah's mother testified that Alleah is seen periodically at the University of Iowa Hospitals and Clinics. Alleah was referred to GWAEA Early Childhood Programs by the Parent Education Specialist. Appropriate tests and evaluations were conducted, and a staffing was held on February 4, 1982, with the mother present. At the staffing it was decided the appropriate placement would be the home Program/Physical Disability at the Handicare Center.

The program goals established for Alleah at that time were general developmental stimulation with emphasis on neuromotor development. Mrs. A. signed a permission form and Alleah entered the program in February, 1982. This was the parent's initial approval

for Alleah's placement in a special education program.

Handicare is a public, nonprofit day-care center in Coralville, Iowa, serving handicapped and nonhandicapped children from infancy to age 6, or older if the developmental age is below 6 years. Handicare has a staff of five teachers (3 full-time, 2 part-time) with a registered nurse serving as the Director. Additional part-time help is received from University of Iowa students in programs such as nursing, early childhood education and recreation therapy. The facility is licensed for 15 students (full-time equivalency). There are 26 students enrolled, though the attendance is varied. Some attend only on certain days of the week while others attend at varying hours, with the heaviest student enrollment from 3:00 to 5:30 p.m. At this time, the handicapped ratio is

higher than earlier in the day, perhaps two-thirds handicapped to one-third nonhandicapped. Normally the ratio is around 50 percent with some type of disability.

Handicare opened in October, 1981, and had only three students when Alleah enrolled in October of that year. There is now a waiting list of 30 children seeking enrollment. The facility is designed and equipped to accommodate handicapped children. At the present time, space sometimes is limited. Plans are underway for expanding the facility with a target date of the fall of 1984.

The program at Handicare provides for social interaction, group activities, large motor activities, small group language and fine motor skills development, and arts and crafts with instruction modified to accommodate the students' handicaps. Teaching strategies

are implemented to foster interaction between handicapped and nonhandicapped children.

The Appellee stated that, "We believe Handicare is a good program. We do not raise any questions about the quality of the program."

Handicare does not have a contractual arrangement with GWAEA; however, GWAEA does provide support and related services to certain students (including Alleah) and staff as needed. The Handicare staff endeavors to accomplish the recommendations made by the GWAEA staff.

Alleah's father is president of the Handicare Board of Directors, and her mother is soon to be on the Handicare Advisory Board. They are both employed in the community and pay Handicare $55.00 per week for Alleah's care at the Center. They have not investigated the possibility of obtaining outside

financial assistance to help defray this expense.

On March 8, 1982, the GWAEA Occupational Therapy report indicates that Alleah, at chronological age 18 months, appears to be functioning at approximately the 8 or 9 month level. The program developed for Alleah will monitor her progress and provide suggestions to the parents and the day-care staff for motor, developmental and remediation stimulation. Alleah was reported to be a "very social child" who initiates interactions with other children at the day-care center.

Paulette M. Harar, M.D., Director of Educational Pediatric Rehabilitation, Rehabilitation Institute of Chicago, in a letter dated September 3, 1982 to Alleah's parents following an evaluation, identified one of her problems as Athetoid Cerebral Palsy and recommended

that she continue in a child stimulation or play program until eligible for therapy in the educational model.

On November 4, 1982, Alleah's mother approved a request made by GWAEA Early Child [sic], Occupational Therapist Jody Hart, for an evaluation of Alleah's vision status and educational recommendations for visual stimulation from the GWAEA vision specialist. Later in November, 1982, Mary Ellen Brissey, GWAEA early childhood speech/language clinician, met with Alleah's mother and Ann Riley, Handicare director, regarding Alleah's speech and language needs. The clinician stated that Alleah had a receptive language age of 14 months and an expressive language score of 8 months. (At the time of this evaluation, Alleah had a chronological age of 25 months.) The report indicated that the gap between understanding and use of language appears

to be due to neuromuscular involvement. The gap between Alleah's chronological age and receptive language skills appears related to a more generalized delay in development. The report concluded that speech and language development should be reviewed in the spring of 1983.

The speech and language clinician again saw Alleah on May 24 to re-evaluated her speech and language, to review her skills progress and to determine program options. The clinician met in Alleah's home with Mark and Ruth A., a GWAEA social worker and a GWAEA psychologist. It was noted that Alleah does appear to have some motor impairment inhibiting speech. At some later time a speech pathologist may need to provide assistance to improve her articulation production and help in compensating for excessive movement such as better positioning and phrasing in conversation.

Alleah's parents, a GWAEA social worker and a GWAEA occupational therapist made a joint referral on March 1, 1983, requesting speech, psychological, motor, social, vision and hearing evaluations and educational services as determined appropriate. The referral also stated: "Alleah is in home program and at Handicare -- we are asking for evaluation to consider appropriateness of program and program goals."

In May, 1983, Alleah's parents received a copy of an assessment administered earlier in that month. At that time she had a chronological age of 32 months, and according to the instrument used, (continuum of assessment, programming, evaluation and research) had a range of 13 months in gross motor skills to a high of 20 months in social skills. In general, it appears that Alleah's developmental functioning

is at around 50 percent that of a nonhandicapped individual the same chronological age.

The report states that in the Handicare day-care/preschool setting, Alleah takes part in some small group activities with adult assistance and seems to enjoy sitting with a group and watching or participating. According to the report, Alleah was not observed taking part in parallel play in a free play situation, but when she was taken apart by an adult with one or two other children of her developmental level, she would take part in back and forth play. When no adult is giving her attention, Alleah spends much time moving around the room alone.

The May, 1983 report made the following recommendations:

1. Moderate to maximum need for OT and PT therapy services.

2. Continued attention to use of vision is needed.

3. More time in an environment where the attractions of moving around and visual and auditory distractions are minimized.

4. More participation in a small structured group for a short time as well as playing with one or two other children with adult assistance.

5. Adults need to keep naming objects and actions in Alleah's everyday environment.

6. Continue work in the area of self-help -- eating and dressing.

A copy of the Early Childhood Programs Psychological Interpretive Report, dated May 26, 1983, was provided to the parents. At the time of testing, Alleah's chronological age was 31 months, while her performance level of overall

cognitive functioning was approximately 17 months. Her current level of achievement would suggest a rate of development that is approximately 54-55 percent of life age and would fall between "mild" and "moderate" range of mental retardation. Alleah's teacher at Handicare, Ann Riley, rated her according to items on the California preschool social competency scale. A normed comparison was not obtained; however, Alleah displayed relative strength in handling changes in routine and unfamiliar situations, and in continuing in a self-selected activity without an adult participation [sic]. Alleah was evaluated weakest in areas involving following directions and persisting at teacher-directed activities and play skills. The recommendations in the report included the need to address Alleah's motor impairment and her oculra-

motor [sic] difficulties in her educational programming by providing appropriate positioning, stimulation and adaptations as necessary. It was recommended that particular emphasis should be placed on encouraging Alleah to focus attention on teacher-directed activities and to focus attention on new aspects of a task. The report stated that Alleah's parents have strongly favored mainstreaming. The report recommended that she (Alleah) be considered for placement in a structured special educational preschool in order to meet her special educational needs. Part-time placement may be an option so that she would have the opportunity to continue her involvement in a private preschool or day care.

Alleah's parents attended a staffing June 1, 1983, along with the Sector Coordinator, Barbara Armbruster; Early

Childhood Social Worker, Mary McCue; and Early Childhood Psychologist, Judy May. Alleah had previously been referred for evaluation of programming needs and the purpose of the staffing was to discuss Alleah's special education needs and how they could best be met at the time. The results of the various tests and evaluations were reported in the staffing. Her health, behavior, intellectual functioning and physical condition were also discussed. In the staffing decision, specific program needs were identified in all developmental areas. According to the decision, Alleah will require occupational and physical therapy, assistance with the developmental self-skills, particularly eating and dressing, effective methods of communication, development of cognitive skills, all within an environment that is structured to facilitate the teaching of

these skills. Adaptation of some instructional materials will be required and appropriate positioning will be important in facilitating learning.

Given the above factors, it was recommended that Alleah's special education needs be met in a developmental classroom. The focus of Alleah's program was to emphasize support in all developmental areas, with particular attention paid to using all sensory modalities in an instructional setting to facilitate learning. The placement made effective for the 1983-84 school year was a special self-contained preschool developmental class (PDC) in the category of mental disability/physical disability located in the Horace Mann Elementary School in the District.

At the June 1, 1983 staffing, Alleah's parents disagreed with the above recommendation and expressed their strong

desire that Handicare be considered as an appropriate placement in meeting Alleah's special education needs. The parents were informed of their due process rights and on June 6, 1983, signed a form "Parent Approval for Special Education Placement," in which they stated they did *not* give their consent for a change in the educational placement of their child.

The parents sought legal counsel, and on July 13, 1983, Carroll Lucht requested release of Alleah's records to him. He also asked that a supplemental notice be issued which gives a description of the action proposed or refused by the Agency, an explanation of why the Agency proposes or refuses to take the action, and a description of any options the Agency considered and the reasons why those options were rejected, a description of each evaluation procedure, test, record, or report the Agency used as a basis for

the proposal or refusal, and a description of any other factors which were relevant to the Agency's proposal or refusal. These requests were extracted from 45 C.F.R. § 300.505. The GWAEA Sector Coordinator, Sally Sinclair, responded to the above requests in a letter to Alleah's parents dated September 9, 1983.

During the 1983-84 school year Alleah continued to be enrolled in the program at Handicare Day-Care Center. The GWAEA early childhood programs support and related services staff continued to work with Alleah and her parents. A staffing was held January 27, 1984, to develop an "Individualized Education Program" (IEP) for Alleah from January 1, 1984 to January 1, 1985. Alleah's father participated in the staffing and initialed the form to show evidence of approval. Page 7 of the IEP states that

Alleah, at her present level, interacts primarily with adults -- is friendly with them. She is also interested in babies. She will also play with an older child who works to include her. Back and forth play with other children requires physical assistance by an adult. She does some imitation of other children in motor activities. In the Annual Goal for Social Development (same page) Alleah was described as engaging in back and forth play with other children when structured by an adult but not without physical prompting. She was observed engaging in parallel play in free play situations.

It should be noted that in Alleah's IEP developed on January 1, 1984, no mention is made of mainstreaming or the interaction of handicapped peers with nonhandicapped peers. It speaks only of "other children." [sic]

On February 17, 1984, a mediation session was conducted involving the parties. The possibility of Alleah attending half-time at PDC and half-time at Handicare was suggested. That possibility was rejected by GWAEA. Later, upon reflection, Alleah's parents now believe that a split placement would not, in fact, be an appropriate placement as she needs to be placed in an environment which provides her with consistency.

The Appellant [sic] called an expert witness in the person of Paul Retish, Ph.D., professor of special education, University of Iowa. He testified that the mainstreaming of handicapped children is a movement that was long overdue in special education. The amount of mainstreaming is clearly stated in P.L. 94-142 in somewhat of a negative sense. That is, schools have to justify when

they do not mainstream a child. When asked on cross-examination if there is a relationship between age of the child and the ability of the child to benefit from integration, Dr. Redish [sic] replied, "My guess would be, the earlier the better." Dr. Redish [sic] was unable to state whether P.L. 94-142's "least restrictive environment" referred to the "extent possible" or to the "extent appropriate." [sic] Dr. Retish was not personally familiar with Alleah.

The Appellant [sic] called another expert witness, Tereasa [sic] Blair, Ph.D., assistant professor, special education, University of Iowa. Her major responsibility is the teaching of coordination of mainstreaming programs between special education and regular education both in elementary and early childhood divisions, mostly at the pre-service level for prospective teachers.

She testified that mainstreaming of handicapped children is very important and should be provided as early as possible. She considered interaction important at any age but more important at younger ages. Dr. Blair had reviewed Alleah's education records, but had not met her.

Exhibits one through seven were identified by Dr. Blair as being representative of a number of authors and educators writing in leading educational journals and books relative to the issues of mainstreaming. While these articles generally are supportive of [sic] mainstreaming idea, they point out that a myriad of variables may impact on such programs. The abstract of Exhibit 1 states in relevant part as follows:

> These programs are generally based on the assumption that nonhandicapped peers function as behavioral models and/or reinforcing agents for handicapped youngsters

> within the context of positive social interaction. However, a review of relevant empirical literature indicates that such benefits do not necessarily result from integrated programing." [sic]

The Appellee also directed attention to the Peer Model Approach found in Exhibit 1, page 263.

> While peer imitation is probably the most commonly stated justification for early integration, it is questionable whether preschool age retarded children possess sufficient discrimination skills to imitate the behavior of peers without specific training.

Dr. Blair explained her position by stating that teachers needed plan, design, and structure in order for preschool children to achieve at the optimal [sic] from integration.

The Appellee pointed out a part of the summary of Exhibit 6, which reads in relevant part as follows:

> In developing the rationale for integrating preschoolers with diverse behavioral repertories, social-ethical, legal-legislative, and psychological-educational

> arguments were presented and examined. As pointed out in each of these discussions, the rationale rests largely on societal values, legal decisions, legislative enactments, and educational theory rather than expirical [sic] support." [sic]

Exhibit #8, *Integration Imperative*, is a draft copy written by Department of Public Instruction staff. In general, it refers to moderate and severely handicapped students placed in segregated facilities (as opposed to a class in a regular school) and supports the placement of such students into integrated settings with peers who do not have identifiable handicaps. Since this document is in draft form and does not, at this date, have official endorsement of the Department of Public Instruction, and has not been acted upon by the State Board of Public Instruction, it was accorded the same degree of significance as exhibits from journals and books.

Reid Zehrbach, Ph.D., supervisor of early childhood programs at GWAEA, testified for Appellee that his experience indicated that there is a relationship between a child's age and the ability to benefit from role models. As we grow up, we develop skills to earn from our environment; so a very young child would have minimal skills and would have improved skills as they [sic] grow [sic] older. The more intellectually capable a child is, the more ability the child has to make finer discriminations, and should be better able to learn more from role models or from anything else. He referred to a recent study of all the research in the early childhood area, "Meta Analysis," in which the findings indicate that more learning occurs with the handicapped child in a structured setting. A second finding shows that more learning occurs with better trained

teachers and staff. The study also indicated that the more severely handicapped child needs more structure in the child's education program. Dr. Zehrbach testified that the younger the child, the less capable the child is to intellectually perform, the harder it will be for the child to learn from minimal kinds of cues. Such a child profits from more structure in the learning environment.

The witness reviewed an article by Frank Gresham, "Misguided Mainstreaming," which made the point that all three areas in which people tend to focus upon mainstreaming were determined to be invalid. Those found invalid were: first, placing handicapped children in mainstreamed classrooms will improve their interaction between the handicapped and nonhandicapped; second, that mainstreaming will improve acceptance of

the handicapped by the nonhandicapped; and third, that handicapped students in a mainstreamed situation will learn through modeling.

Dr. Zehrbach identified the PDC program as designed for young handicapped children of multi-categorical background based upon the educational needs of each child, with enough flexibility within the structure of the program to design specific interventions for specific children, such as Alleah.

Deborah Rice, special education consultant, GWAEA, testified [sic] the PDC programs serve disabled children with chronological ages of three to seven (the developmental age range is even greater). The purpose of the program is to provide interventions to meet the special needs of these handicapped children. In the classrooms the teachers are responsible for developing individual programs for

children enrolled. They follow special education guidelines and the rules and regulations of special education in writing the IEPs. The curriculum is developed to meet the needs of children in that age range and is based upon their developmental level and their priority needs. The curriculum is flexible so the teachers can choose what skills are essential for that child. She also testified that nonhandicapped children could serve as models to handicapped children in such skill areas as language and social development if the modeling were designed and structured very carefully and under the supervision of an adult.

Deborah Rice had observed Alleah at Handicare and felt that Alleah was not extremely unusual (unique) as a handicapped youngster and saw nothing in her performance or handicapping condition

that she could not be adequately programmed for in the PDC programs at Horace Mann School.

The Principal of Horace Mann Elementary School and Special Education Facilitator for the District, Richard Hovet, testified that programs for the severe and profound trainable students at all levels are located in regular school attendance centers as opposed to special schools. This is his first year as Principal of Mann. He previously was the administrator at Mark Twain where handicapped and nonhandicapped students were integrated. Horace Mann contains only one morning kindergarten. Mann's enrollment is around 122 regular students, 27 in PDC, and three or four in hearing impaired [sic].

Mr. Hovet testified that he favors more integration at Horace Mann; however, he pointed out that mainstreaming is good

for some students but not all students. He testified that he would have no objection to a preschool program at Mann.

Testimony revealed that no funds were received by the District for Alleah's education because she was not enrolled at Mann. On the issue of student transportation, Mr. Hovet testified that the Iowa City District had bent over backwards to satisfy the parents. The District agreed to pick Alleah up at her home or at Handicare and deliver her back after school to the place of the parents' choice.

Mary McCue, early childhood school social worker for GWAEA, and a former member of Handicare Board of Directors, has been involved with Alleah's program at Handicare the past three years. She possibly knows Alleah as well as anyone besides her parents. In Mary McCue's opinion, most of the handicapped children

she knows have some degree of uniqueness about them, and Alleah is no exception.

Ms. McCue has the responsibility of coordinating and developing the IEPs for Handicare handicapped students. In the development of Alleah's latest IEP, the entire Handicare staff was interviewed to develop ideas to incorporate into the Plan [sic]. Mary McCue drafted the annual goals for the cognitive area and for social development. She testified that she sees nothing in Alleah's handicapping condition that could not be appropriately dealt with in the PDC program at Mann School. She testified that nothing in the PDC program that [sic] would be harmful to Alleah and that she feels the program would meet Alleah's needs. However, she sees benefits and disadvantages in both the PDC and Handicare programs and feels the best

possible placement would be half day in each program.

Mary Ellen Brissey, speech clinician, early childhood department, GWAEA, has known Alleah since October, 1982, and continues to see her on periodic visits to Handicare. She finds Alleah's understanding and use of language close to the level that would be expected for her mental age. A potential problem in her speech may be sound production delay. It is likely to be more difficult to understand her speech as she matures. Peer role modeling will not be helpful to Alleah in language development because her problem is of a physical nature. Her muscles do not move in a normal way. Ms. Brissey testified that her needs could be met in the PDC program. A signing system was initiated by the Handicare staff and Alleah's parents before Ms. Brissey became involved with Alleah. However,

Alleah has very limited use of her hands and the system will become less useful for her in the future because the motor movements necessary to communicate become more refined when expressing things more exactly.

Barbara Armbruster, associate principal, West High School, Iowa City, formerly sector coordinator, GWAEA, testified that she chaired the staffing dated June 1, 1983, that they did discuss optional programming for Alleah, and that the parents had input into the staffing. There was nothing unique about Alleah's handicapping condition that would set her apart from other preschool handicapped youngsters. Alleah was seen as significantly handicapped, and her requirements dictated a structured program. The parents disagreed with this recommendation and expressed their strong desire that Handicare be considered as

the appropriate placement in meeting Alleah's special education needs. Areas included in making the placement recommendation in the PDC program at Mann School included Alleah's need for structure, her significant lag in all developmental areas, and regular availability of support services.

In the PDC program at Mann, it would not be possible for Alleah to interact with preschool nonhandicapped children as Mann does not have a program for preschool nonhandicapped. Mann kindergarten and first grade students could be used for mainstreaming in structured interaction.

II. Conclusions of Law

The Appellants contend in the Affidavit of Appeal that they are challenging the failure of the GWAEA to provide an appropriate education as

mandated by 20 U.S.C. § 401 [sic] *et seq.* to their child. Specifically, they appeal the contents of the June 1, 1983 staffing report and decision first sent to Appellants on September 9, 1983. They contend that the report and decision denies their child continuance in a program of special education appropriate to her needs, and provides for placement in a special education program which is inappropriate to her conditions and needs. They contend that Alleah's present placement at a public nonprofit preschool (Handicare) is the appropriate educational placement because of its strong commitment to serving both handicapped and nonhandicapped children in an integrated setting.

Since October, 1981, the Handicare staff and GWAEA have worked with Alleah and her parents in developing an educational program appropriate to her

needs. The program was provide at the Handicare site and developed under applicable sections of federal statute for providing a free and appropriate public program at the preschool level. Public Law 94-142, section 121A.4 [sic], Free Appropriate Public Education, states in relevant part that,

> . . . [sic] free appropriate public education means special education and related services which: (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the state educational agency - - -; (c) include preschool --- ---; (d) Are provided in conformity with an individual educational program which meets the requirements under § 121a.340-121a.349 of Subpart C [sic].

The Appellant [sic] contends [sic] that: ". . . [sic] [T]o the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes,

separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(5)(B). The Appellant [sic] emphasized the "regular class" aspect of this section of the law while the Appellee asserts that the emphasis is on "maximum extent appropriate." [sic]

The Appellants state that the PDC is not the least restrictive environment for Alleah. They cite absence of nonhandicapped students of the same chronological age as Alleah for modeling certain developmental skills as being restrictive.

In Exhibit 21, Alleah's IEP, the language activities strategies include

"Set up play activities requiring turn taking and asking for objects or actions between children." The strategies included under social development, "Activities arranged with one or several other children in group or free play ..." There is no mention in the IEP of nonhandicapped children. These strategies can be accomplished in either PDC or Handicare. The question becomes: Is the PDC restrictive to the point that it is not an appropriate placement for Alleah?

The Appellants argue that one guideline to consider in an issue of "least restrictive environment" is a balance between the appropriateness of the child's education and the infringement upon the child's right to associate with nonhandicapped children. This view would hold that the Handicare program is the least restrictive because

of association with nonhandicapped students. Is association with nonhandicapped the only test of appropriateness? If appropriateness is defined as providing an education for the handicapped child as delineated in the child's IEP, it should not be forgotten that no mention of "nonhandicapped children" can be found in Alleah's staffing report of June 1, 1983. When the entire program, including such factors as physical space, design and structure of program, readily available support and related services is considered, it could be found that Handicare is a more restrictive program for Alleah than PDC.

The issues of appropriateness and restrictiveness must be seen as operating together and intertwined. It would be possible, as in this case, to have a more appropriate program which could also be

more restrictive. Contrast that with a less appropriate program and also least restrictive [sic].

> Each public agency shall insure: (1) that to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities are educated with children who are not handicapped. 34 C.F.R. § 300.550(b)(1) [sic]

This was considered by the staffing team at the time of the June 1, 1983 staffing, and from the decision reached, it seems clear that their professional judgment at that time was: "to the maximum extent appropriate," for Alleah, the placement should be the PDC.

The United States Supreme Court in *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), emphasized that states, "'to the *maximum extent appropriate*' must educate handicapped children with children who are not handicapped."

[emphasis added] *Springdale School District #50 of Washington County v. Grace*, 693 F.2d 41 (8th Cir. Ct. [sic] 1982) held *"to the maximum extent appropriate,"* as stated in Public Law 94-142, the Education for All Handicapped Children Act of 1975 [sic].

In support of Appellants [sic] contention that the least restrictive principle applies to the preschool setting to the extent it requires the school district to establish contracts with private preschools, they refer to Senate Report No. 168, 94 Cong., 1st Session 22, reprinted in 1975 U.S. Code Cong. & Ad. News 145, 1446 [sic]:

> While the Committee has provided that the State educational agency is to be the final responsible authority for assuring that all handicapped children have available to them free and appropriate public education, it does not intend that the State and local educational agencies must be the sole providers of such services. Particularly with respect to preschool services, while

> local educational agencies are responsible under the Act for making available educational services to handicapped children, the Committee believes that these funds should be deployed wisely, and public and private nonprofit agencies currently providing preschool services should be utilized to meet the full services mandate. The Committee points out however, that services provided in this fashion are required to meet all the requirements of the committee bill including provisions relating to the least restrictive environment.

A policy letter prepared by the Bureau of Education for the Handicapped included in the record as Exhibit #16 reads in relevant part as follows:

> Although preschool handicapped children receiving special service have the same rights as school-age handicapped children under Pub.L. 94-142, a district may not be required to set up programs for nonhandicapped preschoolers simply to provide a "Least Restrictive Environment" for the handicapped students. Neitehr may districts be compelled to establish extensive contract programs with private schools which serve both handicapped and nonhandicapped children solely to implement the LRE principle; the LRE requirements 'must be met by an alternative means.' Where the state requires preschool education for

> handicapped students, a district may provide services for the handicapped preschooler and still satisfy the 'Least Restrictive Environment' requirement of Pub.L. 94-142 in several ways: e.g., linking the handicapped program with some other nonhandicapped program; or placing the handicapped preschooler program in a regular school with school-age nonhandicapped students." [sic]

The GWAEA believes that mainstreaming may not be appropriate for Alleah at this time. Yet, they reason that they have complied fully with the recommendations of the Bureau.

The Appellant [sic] objects [sic] to the BEH policy letter being regarded as a controlling authority and cites *Brown Exp. Inc. v. United states* [sic], 607 F.2d 695, 700 (5th Cir. 1979), for the proposition that interpretive rulings are statements as to what the agency thinks the statute or regulation means; *Aiken v. Obledo*, 442 F.Supp. 628, 653 (E.D. Calif. 1971) for the proposition [sic] the policy statements do not impose

obligations on those regulated; and *Columbus Community Hospital, Inc. v. Califano*, 614 F.2d 181, 185 (8th Cir. 1980) for the proposition that an agency interpretation must be reversed if it is erroneous or inconsistent with regulations. These decisions are uncontested and do not seem to jeopardize the position taken in the BEH policy letter. The policy letter has been tested by years of scrutiny and has stood up under previous due process hearings, e.g., Exhibit #10.

In addition to Appellants' request that Alleah be placed in Handicare by GWAEA at no cost to her parents, they also asked to be reimbursed for the expenses they incurred in placing Alleah at Handicare during the 1983-84 school year.

Under Title 34 C.F.R. § 300A.504(b)-(1)(11)(2), parental consent was obtained

before the initial placement of Alleah in a program providing special education and related services. Except for initial placement, consent may not be required as a condition of benefit to the child.

In the June 1, 1983 staffing, the parents did not give their consent to place Alleah in the PDC at Horace Mann school, and shortly thereafter, initiated due process procedures for a hearing. The parents elected to place Alleah in Handicare rather than PDC.

Federal rules found at Title 34 C.F.R. § 300A.403(A) states [sic] that: "If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services

available to the child as provided under § 300A.450 -- 300a.460 [sic]."

Testimony revealed that Alleah was not extremely unusual or unique as a handicapped youngster and that there was nothing in her performance or handicapping condition that could not be adequately programmed for in the PDC program at Horace Mann School. Since Alleah's handicapping conditions are not of a unique nature, special education administrative regulation 670--12.19(8)(b), Iowa Administrative Code, "The pupil's special education needs are of a unique nature and cannot be met in other special programs for preschool handicapped pupils," is not applicable.

The Appellee argued that the PDC program provides a parity of opportunity to handicapped students since Iowa does not provide free compulsory preschool education for nonhandicapped children,

and, therefore, meets the standards set out in *Buchholtz* and *Rowley*. The Appellants contend that the Iowa Code has a stronger preference for mainstreaming that does P.L. 94-142. They point to the Iowa Code section 28.2(2), 1983, [sic] which states: "to the maximum extent *possible*.[sic] ", while 20 U.S.C. Sec. 1412 (5)(B) uses the language: "To the extent *appropriate*." [emphasis added] To discuss the differences between "possible" and "appropriate" may not be germane to this hearing.

It is noted under Section 281.2(2) that: "*Special classes*, separate schooling or other removal of children requiring special education from the regular educational environment, shall occur only when, and to the extent that the nature or severity of the educational handicap is such that education in regular classes, even with the use of

supplementary aids and services, cannot be accomplished satisfactorily." [emphasis added] It is also stated that "Special aids and services shall be provided to children requiring special education who are less than five years of age if the aids and services will reasonably permit the child to enter the educational process or school environment when the child attains school age. From the testimony presented, GWAEA maintained the position that a special class placement is necessary for Alleah's educational benefit.

Mary McCue testified that for personal reasons she would like to see a half-time placement of Alleah at PDC and half-time at Handicare. Though a full-time placement in the PDC at Mann School would not be harmful to Alleah, in her judgement such a placement is appropriate.

In a mediation session, February 17, 1984, the half-time PDC and Handicare placement was discussed and rejected by GWAEA. At the time of the hearing, Alleah's parents believed the split placement would not be appropriate because they believe Alleah needs to be placed in an environment which provides her with consistency.

Matters of individual student records and due process procedures were uncontested.

All motions and objections not previously ruled upon are hereby overruled.

III. Decision

The decision of Grant Wood Area Education Agency 10 as taken from the June 1, 1983 staffing that Alleah be placed in a special self-contained/ preschool developmental class located in

the Horace Mann Elementary School, Iowa City Community School District is hereby affirmed. AEA 10 is not required to reimburse the parents for the expenses they incurred in placing Alleah at Handicare during the 1983-84 school year.

August 1, 1984

DATE

/s/Merle A. Wilson

MERLE A. WILSON

PRESIDING OFFICER

APPENDIX F

Statutes, Regulations and Policy Letter Involved

20 U.S.C. § 1412(5)(B) (1982)

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

. . .

(5) The State has established . . .

(B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in

regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, . . .

LEAST RESTRICTIVE ENVIRONMENT

34 C.F.R. § 300.550 (1986)

§ 300.550 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 300.550-300.556.

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational

environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.551 (1986)

§ 300.551 Continuum of alternative placements.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under § 300.13 of Subpart A (instruction in regular classes, special classes, special schools, home

instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

34 C.F.R. § 300.552 (1986)

§ 300.552 Placements.

Each public agency shall insure that:

(a) Each handicapped child's educational placement: (1) Is determined at least annually,

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

(b) The various alternative placements included under § 300.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

34 C.F.R. § 300.553 (1986)

§300.553 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.306 of Subpart C, each public agency shall insure that each handicapped child participates with nonhandicapped children in those services and activities to the

maximum extent appropriate to the needs of that child.

APPENDIX G

EHA RULINGS/POLICY LETTERS, 211:347, SUPPLEMENT 137, FEBRUARY 1, 1985

Inquiry by:

Joan Turner Clary

Consultant, Preschool Handicapped

Pupil Personnel Services Branch

Special Education Division

Iowa Department of Public Instruction

Grimes State Office Building

Des Moines, IA 50319

Digest of Inquiry

(October 4, 1984)

What is the SEP policy on the responsibility of school districts to integrate handicapped preschoolers into private preschools in a state where there is no public school program for nonhandicapped students under the age of five?

Digest of Response

(November 19, 1984)

Least Restrictive Environment

Although EHA-B does not require an LEA or SEA to establish preschool programs for nonhandicapped children, the LEA or SEA must implement LRE requirements of Reg. 300.550-300.556 for preschool handicapped children. Means of meeting the LRE requirements include locating preschool handicapped programs in regular elementary school buildings or with nonhandicapped preschool programs operated by other public agencies; LEAs and SEAs are not required to contract with private preschools.

Text of Inquiry

Enclosed are the briefs filed and the decision of the state hearing officer in regard to the parents' request for an integrated placement for a preschool

child who is physically handicapped. [Not reproduced.]

This case has now been appealed to Federal District Court. There has been a preliminary hearing to determine Drew's current placement.

I hope this information will prove helpful in the issuance of a current policy statement regarding the responsibilities of local school districts for integration into private preschools. Iowa currently has no procedures for providing public school programs for non-handicapped children below the age of five. School districts are mandated to provide special education programs for children with an identifiable handicapping condition.

Prompt attention to our request for policy clarification specific to preschool integration will be appreciated.

Text of Response

Thank you for your letter regarding the Iowa State Education Agency's responsibility for implementing the least restrictive environment (LRE) provision (section 612(5)(B) of the Education of the Handicapped Act) for preschool handicapped children. The specific situation described in your letter is based on the fact that the State of Iowa mandates public preschool programs for handicapped children, but does not have public preschool programs for non-handicapped children.

As you are aware, in the past the Department has taken the position that Part B of the Education of the Handicapped Act (EHA-B) and its accompanying regulations (34 CFR Part 300) do not require a State educational agency (SEA) or local educational agency

(LEA) to establish preschool programs for nonhandicapped children. Nor does the EHA-B require an SEA or LEA to enter into extensive contractual arrangements with private facilities for the sole purpose of implementing the LRE provisions. This policy, however, does not relieve a State of its statutory responsibility to implement the LRE provisions under 34 CFR 300.550-300.556 with regard to preschool handicapped children. In the absence of public preschool programs for nonhandicapped children, there are a number of ways an SEA or LEA could meet the LRE requirements, such as linking the preschool handicapped programs to preschool programs for nonhandicapped children operated by other public agencies (such as Head Start), or by locating preschool handicapped programs in regular elementary school buildings.

This remains the current policy of the Department.

Although SEAs and LEAs have a certain amount of flexibility about the method of meeting the LRE requirements, they must ensure that each handicapped child's placement is based on the child's unique needs as specified in the indivudalized education program (IEP). *See* 34 CFR 300.552(a). The placement team must determine where the special education and related services contained in the IEP can be appropriately provided in the least restrictive environment.

Wendy M. Cullar

Director

Special Education Programs

86 1394

Supreme Court, U.S.
FILED
DEC 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2357SI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MARK A., as parent and next friend of ALLEAH A., a minor child,

Petitioner,

v.

GRANT WOOD AREA EDUCATION AGENCY, an Iowa School Corporation; IOWA CITY COMMUNITY SCHOOL DISTRICT, an Iowa School Corporation; and ROBERT D. BENTON, in his official capacity as Director, Iowa Department of Education,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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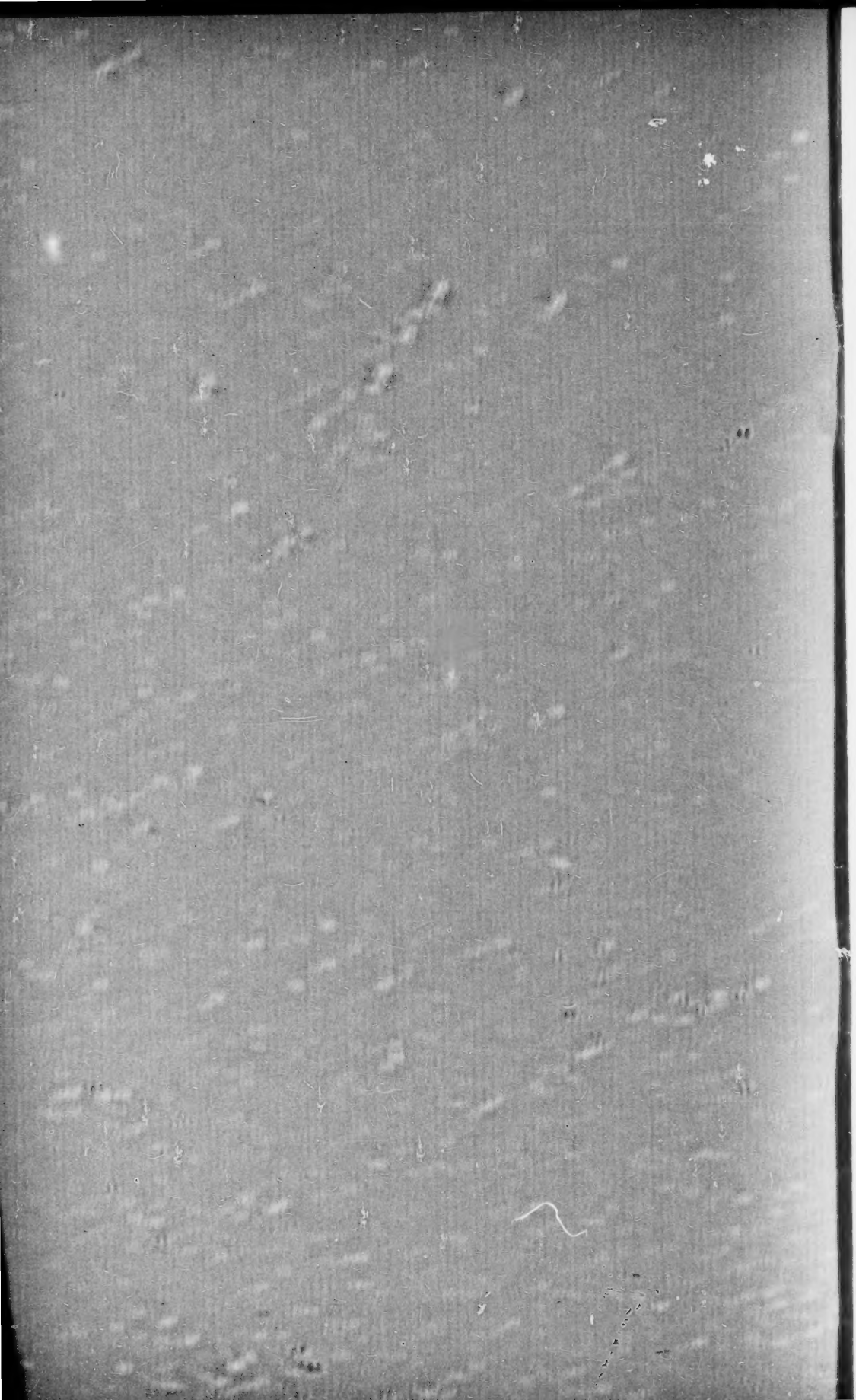

QUESTION PRESENTED

Whether a local education agency is required to place a handicapped preschool age child in a private school at state expense for the sole purpose of satisfying the mainstreaming goals of the Education For All Handicapped Children Act, 20 U.S.C. §1412(5)(b) (1982), when:

(1) A free appropriate public education is available;

(2) The child's individualized educational program is reasonably calculated to enable the child to receive educational benefits;

(3) The child's handicap is not unique;

(4) The child is placed in the least restrictive environment available under state law;

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STATUTES AND REGULATIONS

20 U.S.C. §1412(2)(B):

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

. . .

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with the State law or practice, or the order of any court, respecting public education within such age groups in the State;

Iowa Code §281.2 (1983):

1. "*Children requiring special education*" means persons under twenty-one years of age, including children under five years of age, who are handicapped in obtaining an education because of physical, mental, emotional, communication or learning disabilities or who are chronically disruptive,

as defined by the rules of the department of public instruction.

2. "*Special education*" means classroom, home, hospital, institutional, or other instruction designed to meet the needs of children requiring special education as defined in subsection 1; transportation and corrective and supporting services required to assist children requiring special education, as defined in subsection 1; in taking advantage of, or responding to, educational programs and opportunities, as defined by rules of the state board of public instruction.

It is the policy of this state to provide and to require school districts to make provision, as an integral part of public education, for special education opportunities sufficient to meet the needs and maximize the capabilities of children requiring special education. This chapter is not to be construed as encouraging separate facilities or segregated programs designed to meet the needs of children requiring special education when such children can benefit from all or part of the education program as offered by the local school district. To the maximum extent possible, children requiring special education shall attend regular classes and shall be educated with children who do not require special education. Whenever possible, hindrances to learning and to the normal functioning of children requiring special education within the regular school environment shall be overcome by the provision of special aids and services rather than by separate programs for those in need of special education. Special classes, separate schooling or other removal of children requiring special education from the regular educational environment, shall occur only when, and to the extent that the nature of severity of the educational handicap is such that

the education in regular classes, even with the use of supplementary aids and services, cannot be accomplished satisfactorily. For those children who cannot adapt to the regular educational or home living conditions, and who are attending facilities under chapters 263, 269 and 270, upon the request of the board of directors of an area education agency, the department of social services shall provide residential or detention facilities and the area education agency shall provide special education programs and services. The area education agencies shall co-operate with the board of regents to provide the services required by this Act.

Special aids and services shall be provided to children requiring special education who are less than five years of age if the aids and services will reasonably permit the child to enter the educational process or school environment when the child attains school age.

Every child requiring special education shall, if reasonably possible, receive a level of education commensurate with the level provided each child who does not require special education. The cost of providing such an education shall be paid as provided in section 273.9, this chapter and chapter 442. It shall be the primary responsibility of each school district to provide special education to children who reside in that district if the children requiring special education are properly identified, the educational program or services has been approved, the teacher or instructor has been certified, the number of children requiring special education needing that educational program or service is sufficient to make offering the program or service feasible, and the program or service cannot more economically and equably be obtained from the area education agency, another school district,

another group of school districts, a qualified private agency, or in co-operation with one or more other districts.

Any funds received by the school district of the child's residence for the child's education, derived from funds received through chapter 442, this chapter and section 273.9 shall be paid by the school district of the child's residence to the appropriate education agency, private agency, or other school district providing special education for the child pursuant to contractual arrangements as provided in section 273.3, subsections 5 and 7.

Iowa Code §299.1 (1983):

Attendance requirement. Any person having control of any child over seven and under sixteen years of age, in proper physical and mental condition to attend school, shall cause said child to attend some public school for at least twenty-four consecutive school weeks in each school year, commencing with the first week of school after the first day of September, unless the board of school directors shall determine upon a later date, which date shall not be later than the first Monday in December.

The board may, by resolution, require attendance for the entire time when the schools are in session in any school year.

In lieu of such attendance such child may attend upon equivalent instruction by a certified teacher elsewhere.

34 C.F.R. §300.403(a) (1984):

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by

this part to pay for the child's education at the private school or facility....

670 I.A.C. §12.4(1) (1983):

In implementation of section 281.2 and these rules, children requiring special education shall attend regular class and receive services in a regular school to the maximum extent possible and appropriate. It is the policy of the department that school districts shall in co-operation with the area education agency, assemble sufficient numbers of children requiring special education in individual regular schools so that they may be efficiently served in conjunction with school programs for nonhandicapped pupils.

670 I.A.C. §12.19(8) (1983):

Placement of a preschool handicapped pupil in a licensed preschool program for nonhandicapped pupils may be made provided that:

a. The child is also enrolled in a home instruction or center-based program in addition to placement in a preschool for nonhandicapped children.

b. The pupil's special education needs are of a unique nature and cannot be met in other special programs for preschool handicapped pupils.

c. Appropriate special education support services are provided in accord with the pupil's needs.

d. The length of any single placement is for one academic year or less.

e. The director has approved the individualized educational plan and a procedure for ongoing evaluation.

f. The preschool teacher serving the handicapped child is appropriately certified by the Division of Teacher Education and Certification.

g. An appropriate special education consultant from the area education agency is assigned to each pupil to regularly monitor through twice a month site visits, the child's progress and performance.

No. 85-2357SI

IN THE
SUPREME COURT OF
THE UNITED STATES
October Term, 1986

MARK A., as parent and
next friend of ALLEAH A.,
a minor child,
v. *Petitioners,*
GRANT WOOD AREA EDUCATION AGENCY,
an Iowa School Corporation;
IOWA CITY COMMUNITY SCHOOL DISTRICT,
an Iowa School Corporation; and
ROBERT D. BENTON, in his official
capacity as Director, Iowa Department
of Education,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Alleah A. was less than three years old when this dispute arose. She is afflicted with a variety of handicapping conditions and her developmental age is approximately one-half of her chronological age.

Alleah began attending Handicare, Inc. in October 1981

when she was 13 months old. Handicare is a private nonprofit day-care center for both handicapped and nonhandicapped children from infancy through age six. Alleah was referred to Grant Wood Area Education Agency's Early Childhood Program during the fall of 1981 for testing and evaluation. The Early Childhood staff reviewed Alleah's needs at a staffing on February 4, 1982. Based on the staffing, Grant Wood Area Education Agency (Grant Wood) recommended that Alleah continue at Handicare for the remainder of the school year in addition to a home instruction program. Alleah's mother participated in the staffing and agreed to Alleah's placement in a special education program.

Placement recommendations are reviewed annually by Grant Wood, and on June 1, 1983, a second staffing was held to reevaluate Alleah's special education needs. The Early Childhood staff found that Alleah needed more time in a structured environment than she received at Handicare and in the home instruction program, concluding:

> Specific program needs were identified in all developmental areas. Alleah will require occupational and physical therapy, assistance with the developmental self-skills, particularly eating and dressing, effective methods of communication, development of cognitive skills, *all within an environment that is structured to facilitate the teaching of these skills.* It was agreed that it will be particularly important to make use of all sensory modalities when working with Alleah, particularly the use of her tactile skills. Adaptation of some instructional materials

> will be required and appropriate positioning will be important in facilitating learning. (emphasis added)

The staffing team recommended placement in a preschool development classroom (PDC) in a category of mental disability/physical disability. Preschool developmental classes are multi-categorical classes that serve handicapped children ages three to seven. The curriculum is developed to meet the unique needs of handicapped preschool age children based on their developmental level. Some of the children have a primary disability in one area which interferes with their learning of that skill but have adequate skills in other development areas. The PDC recommended for Alleah was located at a regular elementary school in the district. Transportation to and from school was to be provided at no expense to her parents.

Students in PDC are not integrated with pre-school age nonhandicapped children because the State of Iowa does not provide public preschool programs for nonhandicapped children. Therefore, there are no nonhandicapped preschool age children enrolled in public education programs. PDC students do have the opportunity to interact with kindergarten and first grade students outside of the classroom. The PDC program is the least restrictive program available within the public system.

Alleah's parents disagreed with the PDC recommendation and appealed the PDC placement to the Iowa Department of Public Instruction. They wanted Alleah placed at state expense in a private school which served both handicapped and nonhandicapped preschool age children in the same

classroom. An administrative hearing was held on May 15, 1984. The hearing officer found that the placement decision of the staffing team was appropriate for Alleah and denied the parents' request for placement in a private school at state expense.

Mark and Ruth A. then filed suit in the United States District Court for the Southern District of Iowa. The case was submitted to the court on a stipulated record. On October 25, 1985, the District Court affirmed the decision of the hearing officer.

Alleah's parents appealed to the Eighth Circuit. They argued that integration of handicapped children with nonhandicapped children in the same classroom was required regardless of age. At oral argument before the Eighth Circuit, counsel for Alleah conceded that Alleah's handicap was not unique and that if private placement were required for her, it would be required for all other handicapped children in the PDC program. The Eighth Circuit found that the Act did not "compel the state to establish entire new levels of public education services to satisfy the Act's mainstreaming requirements," and upheld the judgement of Iowa's educational authorities that Alleah could receive a free appropriate public education by placement in the PDC program at a public elementary school.

REASONS FOR DENYING THE WRIT

THE EIGHTH CIRCUIT IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR OTHER FEDERAL COURTS OF APPEAL.

Petitioner argues that the Eighth Circuit's decision is in

direct conflict with the Sixth Circuit's decision in *Roncker v. Walter,* 700 F.2d 1058 (6th Cir. 1983) and is inconsistent with the Eighth Circuit's own holding in *Springdale School District #50 v. Grace,* 693 F.2d 41 (8th Cir. 1982). Petitioner's argument is without merit. The Eighth Circuit's ruling follows this Court's decision in *Board of Educ. v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034 (1982), as well as the guidelines established in *Roncker* and *Springdale.*

The Court in *Rowley* established a two step test for judicial review of suits brought pursuant to the Education for All Handicapped Children Act of 1975 (Act), 20 U.S.C. § 1401 *et seq.* First, the court must determine whether the state has complied with the procedures set forth in the Act. Second, the court must determine whether the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits. *Rowley,* 458 U.S. at 206-07, 102 S.Ct. at 3051. The Court also emphasized that handicapped students must be mainstreamed to the "maximum extent appropriate." *Rowley,* 458 U.S. at 181, 102 S.Ct. at 3038.

In the present case, the District Court and Eighth Circuit followed the procedures for review outlined in *Rowley.* Both found that Alleah could receive educational benefits in the PDC program. Further, both the District Court and Eighth Circuit found that PDC allowed Alleah to be mainstreamed to the maximum extent appropriate.

In *Roncker v. Walter,* 700 F.2d 1058 (6th Cir. 1983), plaintiff's son, Neill Roncker, was nine years old and severely mentally retarded. He required special instruction and could not be placed in educational classes with nonhandicapped

children. His evaluation, however, indicated that he would benefit from contact with nonhandicapped children. At issue was whether Neill should be placed in a special education program located in a county school exclusively for mentally retarded children or at a regular school where he would have some contact with nonhandicapped children.

The Sixth Circuit recognized that the Act required placement of handicapped children with nonhandicapped children to the maximum extent appropriate. The court stated that if there are two available public programs which could provide "educational benefits," then placement must be made in the least restrictive environment. The Sixth Circuit found the district court had utilized an improper standard of review and remanded with instructions to determine whether Neill's educational needs could be provided within a regular school rather than a segregated school. *Roncker v. Walter,* 700 F.2d at 1062.

In *Springdale School District #50 v. Grace,* 693 F.2d 41 (8th Cir. 1892), the school district recommended that Sherry Grace be placed in a segregated school for deaf children. Sherry's parents and the State Board of Education desired placement at a regular school with a certified teacher of the deaf. The hearing officer agreed with Sherry's parents and State Board. The issue before the Eighth Circuit was whether Sherry's individualized educational program was reasonably calculated to enable her to reach educational benefits.

The Eighth Circuit recognized that there were two available public programs which could provide educational benefits and found that the goal of mainstreaming was served by placing Sherry in the least restrictive environment available.

The court declined to reverse the judgment of the State's administrative decision makers that Sherry could receive a "free appropriate public education" at Springdale School. *Springdale*, 693 F.2d at 43.

Neither *Roncker* nor *Springdale* addressed placement issues involving private schools or preschool age students. Both cases involved a choice between two available public programs for school age children, one of which was more restrictive than the other. In the present case, the Eighth Circuit recognized that at issue is not a choice between two available programs, but petitioner's request for placement beyond the least restrictive environment within the public school system. The court properly held that the Act "does not compel the state to establish entire new levels of public education services to satisfy the Act's mainstreaming requirements." *Mark and Ruth A. v. Grant Wood Area Education Agency*, 795 F.2d 52, 54 (8th Cir. 1986.)

THE HANDICAPPED CHILD IS RECEIVING A FREE APPROPRIATE PUBLIC EDUCATION IN THE LEAST RESTRICTIVE ENVIRONMENT AVAILABLE

The Act requires states to provide a free appropriate public education for all handicapped children between the ages of three and twenty-one. 20 U.S.C. §1412(2)(B) (1982). The State of Iowa has elected to provide special education services to children under the age of three. *See* Iowa Code §281.2 (1983). Alleah, who was less than three years old when this dispute arose, was offered a free appropriate public education but her parents wanted her placed at a private school because they felt

Alleah would receive more contact with nonhandicapped preschool age children at the private school.

The Act does not mandate "mainstreaming" in the case of handicapped preschoolers when it would be inconsistent with state law. *See* 20 U.S.C. §1412(2)(B) (1982). Under Iowa law, handicapped children who need special education "attend regular classes and receive services in area schools to the maximum extent possible and appropriate." 670 I.A.C. §12.4(1). The State of Iowa does *not* provide public *preschool* programs for *nonhandicapped* children, but does require public preschool programs for *handicapped* children. *Compare* Iowa Code §299.1 *with* §281.2 (1983). Therefore, there are no area schools with nonhandicapped preschoolers. The only way school districts in Iowa could fully "mainstream" handicapped preschoolers would be to contract with private day-care centers for the sole purpose of mainstreaming. Such an extensive system of contracting is not required by the Act and would be inconsistent with state law under the circumstances of this case. Iowa administrative regulations preclude placement of handicapped preschoolers in a private school at state expense unless the pupil's "special education needs are of a unique nature and cannot be met in other special programs for preschool handicapped pupils". *See* I.A.C. §12.19(8)(b) (1983).

In the present case, petitioner did not contend at the administrative hearing that Alleah's special education needs were of a unique nature. Further, petitioner did not dispute that PDC could provide Alleah with educational benefits.

Petitioner misconstrues the mainstreaming goals and requirements of the Act as they relate to preschool age children. The Act does not require integration of preschool age

handicapped children with preschool age nonhandicapped children in the same classroom. According to the United States Department of Education and the Bureau of Education for the Handicapped, in the absence of public preschool programs, a local education agency may meet the mainstreaming goals of the Act by locating preschool handicapped programs in a regular elementary school building. (See Appendix A). Handicapped preschoolers are thus part of the regular public school system and are not relegated to a segregated facility.

In the present case, Alleah's parents had two options available. First, they could place their child in an appropriate program in the least restrictive environment available in the public school system. Second, they could enroll their child at a private day-care center at their own expense. Alleah's parents chose the latter option, and under such circumstances the school district and local education agency are not required to reimburse them for the private education of their child:

> "If a handicapped child has available a free *appropriate public* education and the parents choose to place the child in a *private* school or facility, the part to pay for the child's education at the private school or facility. . . ." (Emphasis added)

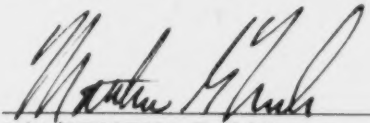
Burlington School Committee v. Dept. of Educ., _____ U.S. _____, 105 S.Ct. 1996, 2005 (1985), *citing* 34 C.F.R. §300.403(a) (1984).

CONCLUSION

Petitioner has failed to establish grounds for granting the writ of certiorari. The Eighth Circuit Court of Appeals did not decide the case in a way which conflicts with applicable

decisions of this Court or another federal court of appeals. The Eighth Circuit adequately analyzed the issues and facts and correctly interpreted state law. The petition for writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Matthew G. Novak, attorney for respondents herein, and a member of the Bar of the Supreme Court of the United States*, hereby certify that I served true and correct copies of the foregoing Respondents' Brief in Opposition on Carroll L. Lucht, Civil Litigation Clinic, University of Iowa, College of Law, Iowa City, Iowa 52242.

Matthew G. Novak

*Application for membership pending

APPENDIX A

United States Department of Education
Policy Letter/November 19, 1984

Inquiry by:

Joan Turner Clary
Consultant, Preschool Handicapped
Iowa Department of Public Instruction
Grimes State Office Building
Des Moines, IA 50319

Digest of Inquiry
(October 4, 1984)

What is the SEP policy on the responsibility of school districts to integrate handicapped preschoolers into private preschools in a state where there is no public school program for nonhandicapped students under the age of five?

Text of Response
(November 19, 1984)

Thank you for your letter regarding the Iowa State Education Agency's responsibility for implementing the least restrictive environment (LRE) provisions (section 612(5)(B) of the Education of the Handicapped Act) for preschool handicapped children. The specific situation described in your letter is based on the fact that the State of Iowa mandates public preschool programs for handicapped children, but does not have public preschool programs for nonhandicapped children.

As you are aware, in the past the Department has taken the position that Part B of the Education of the Handicapped Act (EHA-B) and its accompanying regulations (34 CFR Part 300)

do not require a State educational agency (SEA) or local educational agency (LEA) to establish preschool programs for nonhandicapped children. Nor does the EHA-B require an SEA or LEA to enter into extensive contractual arrangements with private facilities for the sole purpose of implementing the LRE provisions. This policy, however, does not relieve a State of its statutory responsibility to implement the LRE provisions under 34 CFR 300.550 — 300.556 with regard to preschool handicapped children. In the absence of public preschool programs for nonhandicapped children, there are a number of ways an SEA or LEA could meet the LRE requirements, such as linking preschool handicapped programs to the preschool programs for nonhandicapped children operated by other public agencies (such as Head Start), or by locating preschool handicapped programs in regular elementary school buildings. This remains the current policy of the Department.

Although SEAs and LEAs have a certain amount of flexibility about the method of meeting the LRE requirements, they must ensure that each handicapped child's placement is based on the child's unique needs as specified in the individualized education program (IEP). *See* 34 CFR 300.552(a). The placement team must determine where the special education and related services contained in the IEP can be appropriately provided in the least restrictive environment.

We hope this information adequately addresses your concerns. Please do not hesitate to contact this Office if we can be of further assistance.

Wendy M. Cullar
Director, Special Education Programs

Bureau of Education for the Handicapped/
Policy Letters, 211:133

Inquiry by:

Harold Burke
Director of Special Education
Alexandria Public Schools
Lee Administrative Annex
1108 Jefferson Street
Alexandria, Virginia 22314

Digest of Response
(January 30, 1979)

Although preschool handicapped children receiving special service have the same rights as school-age handicapped children under Pub. L. 94-142, a district may not be required to set up programs for nonhandicapped preschoolers simply to provide a "Least Restrictive Environment" for the handicapped students. "Neither may districts be compelled to establish extensive contract programs with private schools which serve both handicapped and nonhandicapped children solely to implement the LRE principle"; the LRE requirement "must be met by an alternative means."

Where the State requires preschool education for handicapped students, a district may provide services for the handicapped preschoolers and still satisfy the "Least Restrictive Environment" requirement of Pub. L. 94-142 in several ways: e.g. linking the handicapped program with some other nonhandicapped preschooler program; or placing the handicapped preschooler program in a regular school with school-age nonhandicapped students.

Text of Response
(January 30, 1979)

This is in reply to your letter to Mr. Bill Tyrrell in which you asked for clarification of the least restrictive environment (LRE) provision at the preschool level under Part B of the EHA, as amended by P.L. 94-142. Please accept our apology for the long delay in responding in writing to your request. (I believe, however, that Mr. Bill Tyrrell and Dr. Jerry Vlasak both talked with you on several occasions about your letter.)

The main question raised in your letter was: must the LRE provision be implemented at the preschool level when there is a mandate to serve handicapped children but no requirement to educate nonhandicapped preschoolers. More specifically, you asked: If a local educational agency (LEA) does not provide public school programs for nonhandicapped preschoolers, must the LEA enroll handicapped children in private programs in order to comply with the LRE requirement?

First, each State must insure that a free appropriate public education is available to all handicapped children within the State-mandated age ranges and Federal timelines specified by Section 612(2)(b) of EHA, Part B. When preschool handicapped children are served, they must be provided all rights and benefits accorded under the Act and its implementing regulations (Section 121a.300(b)(4)). The special education and related services provided to such children must be based on an individualized education program (IEP) designed to meet each child's unique needs.

Second, under Part B regulations, each public agency must insure (1) that to the maximum extent appropriate,

handicapped children are educated with nonhandicapped children, and (2) that they are only placed in special classes or separate schools when necessary for their individual needs. (See Sections 121a.550 to 121a.556). This provision applies to preschool as well as school-aged handicapped children.

The LRE provision applies to all handicapped children receiving free appropriate public education. However, the Bureau does not interpret the provision as requiring LEAs that have no preschool programs for nonhandicapped children to establish programs for those children *for the sole purpose* of being able to implement the LRE principle for handicapped children. Similarly, it is not the intent of this provision to compel LEAs to establish extensive contract programs with private schools which serve both handicapped and nonhandicapped children solely to implement the LRE principle.

In jurisdictions where there are no LEA programs for nonhandicapped preschoolers, the LRE requirements must be met by an alternative means. The LEA responsible for the education of handicapped children must carefully determine whether there are any preschool programs serving nonhandicapped children to which the program for handicapped children may linked on even a part-time basis (Head Start, for example). Further, the LEA must consider whether the program may be located in a regular school setting serving nonhandicapped school-age children. Placement decisions must be made on an individual basis in accordance with each child's IEP. Generally, the use of facilities which are separate or otherwise solely devoted to the handicapped is permissible only when necessary to meet an individual preschool child's specific needs.

I sincerely hope that this letter satisfactorily responds to the questions and concerns you raised. If our office can be of further assistance, please let us know.

Thomas B. Irvin, Chief
State Policy and Administrative
Review Branch, DAS
Bureau of Education for the
Handicapped